Puckett v. Tennessee Valley Authority, ARB No. 03-024, ALJ No. 2002-ERA-15 (ARB June 25, 2004)

U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

ARB CASE NO. 03-024
ALJ CASE NO. 2002-ERA-15
DATE: June 25, 2004

In the Matter of:

TERRY O. PUCKETT,
COMPLAINANT,

v.

TENNESSEE VALLEY AUTHORITY,
RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Edward A. Slavin, Esq., *St. Augustine, Florida*

For the Respondent:
Maureen H. Dunn, Esq., Thomas F. Fine, Esq., Linda J. Sales-Long, Esq.,
Tennessee Valley Authority, Knoxville, Tennessee

FINAL DECISION AND ORDER
BACKGROUND

This case arose when Terry O. Puckett filed a complaint alleging that the Tennessee Valley Authority (TVA) retaliated against him for engaging in activity protected by the whistleblower protection provisions of the Clean Air Act, 42 U.S.C.A. § 7622 (West 1995); the Energy Reorganization Act, 42 U.S.C.A § 5851 (West 1995); the Federal Water Pollution Control Act, 33 U.S.C.A. § 1367 (West 2001); the Solid Waste Disposal Act, 42 U.S.C.A. § 6971 (West 2003); and the Toxic Substances Control Act, 15 U.S.C.A. § 2622 (West 1998)(the Acts).

On February 14, 2002, the Department of Labor's Occupational Safety and Health Administration investigated Puckett's complaint and determined that TVA did not retaliate against Puckett in violation of the Acts. Puckett filed a request for a hearing with the Office of Administrative Law Judges as provided in 29 C.F.R. § 24.4(d)(2)(2003).

A Department of Labor Administrative Law Judge (the ALJ) set Puckett's hearing for April 16, 2002, and issued orders specifying the discovery procedures to be followed. The ALJ's judicious, exhaustive, and ultimately fruitless attempts to obtain Puckett's compliance with TVA's discovery requests are detailed at great length at pages 2-9 of the ALJ's Recommended Decision and Order of Dismissal for Failure to Comply with Lawful Orders (R. D. & O.). Ultimately, the ALJ concluded that he was powerless to persuade Puckett to comply with his lawful orders and, accordingly, no sanction less harsh than dismissal would compel Puckett's obedience. Thus, the ALJ entered an order recommending that Puckett's complaint be dismissed with prejudice.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board (ARB) to review an ALJ's recommended decision in cases arising on appeal under the employee protection provisions of the Acts. *See* 29 C.F.R. § 24.8 (2003); *see also* Secretary's Order No. 1-2002, 67 Fed. Reg. 64, 272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising on appeal under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)).

The Board is not bound by an ALJ's findings of fact and conclusions of law in a case arising under the Acts because the recommended decision is advisory in nature. *See* Att'y Gen. Manual on the Administrative Procedure Act, Chap. VII, § 8, pp. 83-84 (1947) ("the agency is [not] bound by a [recommended] decision of its subordinate officer; it retains complete freedom of decision as though it had heard the evidence itself"). *See generally Starrett v. Special Counsel,* 792 F.2d 1246, 1252 (4th Cir. 1986) (under principles of administrative law, agency or board may adopt or reject ALJ's findings and conclusions); *Mattes v. United States Dep't of Agric.,* 721 F.2d 1125, 1128-30 (7th Cir. 1983) (relying on *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 496 (1951) in rejecting argument that higher level administrative official was bound by ALJ's decision). Thus, the ARB engages in de novo review of the ALJ's recommended decision. *See* 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8; *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1571-72 (11th Cir. 1997); *Berkman v. United States Coast Guard Acad.,* ARB No. 98-056, ALJ Nos. 97-CAA-2, 97-CAA-9, slip op. at 15 (ARB Feb. 29, 2000). An ALJ's findings constitute a part of the record, however, and as such are subject to review and receipt of appropriate weight. *Universal Camera Corp.,* 340 U.S. at 492-97; *Pogue v. United States Dep't of Labor,* 940 F.2d 1287, 1289 (9th Cir. 1991); *NLRB v. Stor-Rite Metal Products, Inc.,* 856 F.2d 957, 964 (7th Cir. 1988); *Penasquitos Vill., Inc. v. NLRB*, 565 F.2d 1074, 1076-80 (9th Cir. 1977).

DISCUSSION

An ALJ may recommend dismissal of a complaint based upon a party's failure to comply with a lawful order. 29 C.F.R. § 24.6(e)(4)(i).[1] Furthermore, courts possess the "inherent power" to dismiss a case for lack of prosecution. *Link v. Wabash R. R. Co.*, 370 U.S. 626, 630 (1962). This power is "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Id*. at 630-631. Like the courts, the Department of Labor's Administrative Law Judges must necessarily manage their dockets in an effort to "achieve the orderly and expeditious disposition of cases." *Curley v. Grand Rapids Iron & Metal Co.*, ARB No.00-013, ALJ No. 99-STA-39, slip op. at 2 (ARB Feb. 9, 2000).

Nevertheless, dismissal of a complaint for failure to comply with the ALJ's lawful orders is a very severe penalty to be assessed in only the most extreme cases. *Accord Boudwin v. Graystone Ins. Co.*, 756 F.2d 399, 401 (5th Cir. 1985). The power of a court to prevent undue delays must be balanced against the strong policy in favor of deciding cases on their merits. *Dodson v. Runyon,* 86 F.3d 37, 40 (2d Cir. 1996); *Bluestein & Co. v. Hoffman,* 68 F.3d 1022, 1025 (7th Cir. 1994).

In *Gratton v. Great American Communications,* 178 F.3d 1373, 1374-1375 (11th Cir. 1999), the court explained:

> Rule 41(b) authorizes a district court to dismiss a complaint for failure to prosecute or failure to comply with a court order or the federal rules. *See* Fed.R.Civ.P. 41(b). Dismissal under Rule 41(b) is appropriate where there is a clear record of "willful" contempt and an implicit or explicit finding that lesser sanctions would not suffice. The district court also has broad authority under Rule 37 to control discovery, including dismissal as the most severe sanction. *See* Fed.R.Civ.P. 37(b)(2)(C). Rule 37 sanctions are intended to prevent unfair prejudice to the litigants and insure the integrity of the discovery process.

(Case citations omitted). After reviewing the R. D. & O., the case record and the parties' briefs, we conclude that the record supports the ALJ's finding that "Counsel's failure to comply with the Scheduling Order was a deliberate unjustified delaying tactic and a deliberate expression of contempt for the Court," R. D. & O. at 14. Furthermore, the record also abundantly supports the ALJ's finding that "Counsel has exhibited a drawn out history of deliberately proceeding in a dilatory manner and his continued disregard of the Court's Orders indicates that with anything less than dismissal, counsel will never understand the severity of potential consequences for not complying with the Court's Orders," R. D. & O. at 15. The ALJ's recommendation to dismiss Puckett's complaint is in accordance with relevant law. Therefore, we adopt the attached ALJ's R. D. & O. as our own.

We note that Puckett has requested the Board to simply ignore his counsel's contemptuous behavior and to permit him to belatedly obtain new representation and proceed with his case. Puckett was served with "all the documents containing disparagement of the Court's integrity . . . ." R. D. & O. at 14. Thus, although Puckett was apprised of his counsel's contumacious refusal to comply with the ALJ's scheduling order, nevertheless, he continued to ratify his counsel's actions as recently as December 27, 2002.[2]

[Page 4]

Although we recognize that Puckett is not personally responsible for the failure of his attorney to comply with the ALJ's Scheduling Order, as the Board held in *Dumaw v. International Brotherhood of Teamsters, Local 690*, ARB No. 02-099, ALJ No. 2001-ERA-6, slip op. at 5-6 (ARB Aug 27, 2002):

> Ultimately, clients are accountable for the acts and omissions of their attorneys. *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 396 (1993); *Malpass v. General Electric Co.*, Nos. 85-ERA-38, 39 (Sec'y Mar. 1, 1994). As the Supreme Court held in rejecting the argument that holding a client responsible for the errors of his attorney would be unjust:
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> > Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all fact, notice of which can be charged upon the attorney."
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> *Link v. Wabash R.R. Company*, 370 U.S. 626, 633-634 (1962) (quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1879)).[3]

Accordingly, we concur in the ALJ's conclusion that Puckett must be held accountable for the actions of his counsel, R. D. & O. at 11-14, and that he "cannot now avoid the consequences of the acts or omissions of [his] freely selected agent." *Link,* at 633-634.

CONCLUSION

Puckett's counsel has not explained his failure to respond to the ALJ's October 1, 2002 Scheduling Order. Furthermore, the ALJ's findings that such failure to comply was deliberate and that no lesser sanction would suffice to compel Puckett to comply with the ALJ's scheduling order are well-supported by the record evidence and are in accordance with law. And, although Puckett was informed of Slavin's actions on his behalf, he

retained Slavin as his counsel, and he cannot now avoid the consequences of his decision to do so. We therefore **AFFIRM AND APPEND** the R. D. & O. and **DISMISS** the complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

[ENDNOTES]

[1] "*Dismissal for cause*. The administrative law judge may, at the request of any party, or on his or her own motion, issue a recommended decision and order dismissing a claim . . . [u]pon the failure of the complainant to comply with a lawful order of the administrative law judge."

[2] See December 27, 2002 Letter to the Board ("Edward Slavin called me today and assured me he is still working in my behalf and in my best interest . . . . Mr. Slavin is still my representative and [I] request that my case not be dismissed.").

[3] The Court did note, however, "[I]f an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice." 370 U.S. at 634 n.10.